NO. 83357-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH J. THORGERSON,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. The defense theory of the case was that the victim, and others, fabricated the story that petitioner sexually abused her. The victim testified she did not fabricate her testimony, and that her statements to various people before trial were all consistent with her testimony. Was any error in the prosecutor's argument that the testimony was credible waived by petitioner's failure to object?

2. Where petitioner introduces evidence of one contradiction of the victim's statement by another witness, did the State's argument that petitioner did not show other contradictory statements improperly shift to petitioner the burden of production to impeach the victim's testimony by inconsistent statements?

3. Where the State argues that the victim is credible, based on the evidence in the trial, does that improperly deprive petitioner of the presumption of innocence?

4. In closing, the petitioner argued that persons who had not testified were supporting him and could tell when the victim was lying. Was any error in the rebuttal characterization of this argument as "slight of hand" waived by the petitioner's failure to object?

5. Where petitioner has not shown that any error in the argument made by the State had the likelihood of influencing the verdict, has petitioner shown prejudice?

II. STATEMENT OF THE CASE

The facts of petitioner's molestation of the victim, Danielle, are adequately set out in the decision of the Court of Appeals.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

Petitioner asserts there was prosecutorial misconduct in the form of vouching for the credibility of the victim, shifting the burden of proof to the defense, arguing facts not in evidence, and disparaging defense counsel. These asserted errors were not objected to, and since they were not flagrant or ill-intentioned, were not preserved for appeal. The arguments and rebuttal petitioner describes as misconduct were either reasonable inferences from the evidence or invited by petitioner. To the extent they were improper, there is no likelihood they influenced the verdict.

B. THE STATE DID NOT VOUCH FOR THE VICTIM.

Petitioner first argues that the State committed misconduct during argument by vouching for the victim. Petition 11-13. Petitioner mischaracterizes the State's argument.

Petitioner stated in his opening statement, "So how do you, as a 17-year old girl, get out from under the thumb of your father? Well, you come up with a story. And that's what happened in this case." 5/19 RP 168.

When the victim testified, petitioner asked her:

> Q: Isn't it true that both John and you came up with this story so that you could get out from under the rules your father and mother had in place and so that you and he could spend more time together?
>
> A: No.

5/20 RP 88.

Petitioner, not the State, then asked the victim if she had discussed the allegations with the prosecutor, detectives, the school counselor, her brother, her grandmother, her mother, petitioner himself, "the sheriff's officers," doctors, and the victim's advocates. The victim answered that she had discussed the allegations with most of the people mentioned, but not her brother, grandmother, mother, or the petitioner himself. 5/20 RP 95-97. Petitioner then asked:

> Q: And you've told your story now numerous, numerous times.
>
> A: Yes.
>
> Q: And to the best of your knowledge, it stayed consistent the entire time.

A: Yes.

5/20 RP 98.

During closing, the State argued:

> So how is it that [the victim's] so clever to come up with this story that he made me do this multiple times back in time. And then beyond that, speaking of cleverness, this apparently is a grand conspiracy between at least four people that have put this together. These rocket scientists that made this perfect lie, and they've held it together for a year. Even though the defense spent so much time pointing out what a bad liar these kids are. They've held this one together? There's been no problems with it, no real cracks in the story. That's amazing. Perhaps it's because it's true. I mean, doesn't it seem sensical that the truth would actually hold together for a year plus?
>
> * * *
>
> How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature? But you didn't get the statement that she says to her from me because there's hearsay rules. The defense brought some out or if they thought there was a contradiction, they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None.
>
> How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing breaks down? You know how that works? It's the truth.

5/21 RP 170, 175.

Arguing that no inconsistent statements had been introduced into evidence was a fair comment on the evidence.

Petitioner characterizes this argument thus:

> In this case, as in Boehning,[1] the prosecutor vouched for Danielle's credibility by implying he knew personally what other statements she had made, although the jury did not hear them. The jury should believe her because he and "people in [his] office," who did not testify, knew what she had said and believed her.
>
> Thus he bolstered her testimony with inferences that the state had other information that the jury could not hear, but that it should rely on anyway, to believe Danielle was telling the truth.

Petition 13.

This characterization by petitioner appears to be an attempt to make the arguments here more in line with those made in Boehning. It does not come close to describing the argument the State actually made.

In Boehning, the State charged three counts of rape and three counts of child molestation. At the close of the State's evidence, the three rape charges were dismissed. Despite that dismissal, the State referred to those counts in closing argument

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[1] State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005).

and said that the victim's out of court statements had proved the counts, but she was not comfortable enough on the stand to testify about them. Boehning, 127 Wn. App. at 513. The Court of Appeals held that "a prosecutor may not make statements that are unsupported by the evidence[.]" Boehning, 127 Wn. App. at 529.

Unlike the argument in Boehning, the State's argument here was supported by the clear testi mony of the victim, elicited on cross, that her statements were consistent. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The argument was a reasonable inference from the evidence.

In any event, petitioner did not object to this argument. Unless petitioner can show that the argument was so flagrant and ill-intentioned that no instruction could have cured any prejudice, the issue is waived. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Petitioner claims the arguments were flagrant and ill-intentioned. Petition 16. He fails to show that this argument was anything but a fair comment on the evidence as it pertained to the credibility of the victim.

C. THERE WAS NO SHIFTING OF THE BURDEN OF PROOF OR OF PRODUCTION.

Petitioner argues, "This argument improperly shifted the burden of proof to the defense: If the defense didn't prove inconsistencies, the law says you can believe Danielle." Petition 14. Again, this is not an accurate portrayal of the argument actually made.

Here, the State did not argue that petitioner had a burden to prove inconsistencies. It merely pointed out that the only contradiction petitioner brought out was the one witness who reported that the victim said petitioner touched her genitals, when the victim said she was able to keep him from actually touching her. The State explained this contradiction as the witness being mistaken. 5/21 RP 174.

Petitioner also argues that by arguing the jury should believe the victim, the State "urged a presumption of guilt, not a presumption of innocence." Petitioner cites no authority for the proposition that the State is precluded from arguing that its witnesses are credible.

Again, there was no objection to this argument. The comments of the State were not "flagrant and ill-intentioned." No error was preserved for review.

D. THE COMMENTS MADE DURING THE STATE'S REBUTTAL ARGUMENT DID NOT IMPUGN COUNSEL.

Petitioner asserts the State's argument that the defense was a "slight of hand" impugned counsel and requires this Court to state that such arguments are improper. Petition 18-19. As the Court of Appeals found, the State's rebuttal argument did not impugn counsel.

During his closing, petitioner argued that members of petitioner's family who knew him and the victim could tell that the victim was lying when she said he molested her. These people had either not testified at all, or had testified, but had not said that they knew the victim was lying. The State's comment in rebuttal was that the defense was asking the jury to consider matters that were not in evidence rather than the evidence. That is not disparagement of the role of counsel. It may be disparagement of the argument, but that is allowed in rebuttal.

Here, the comment called the jury's attention to the petitioner's improper argument that it should consider opinions that

the victim was lying that it had not heard in the evidence. There was no disparagement of counsel.

The rebuttal argument pales in comparison to the arguments made in the cases cited by petitioner. In State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), the prosecutor argued that counsel was being paid to "twist the words of the witness." Id. at 66. In State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), the prosecutor argued his role was to serve justice, defined as a conviction, where counsel had a different role – to serve the interests of his client. Id. at 283. In Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert denied, 469 U.S. 920 (1984), the prosecutor argued "all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to the client's involvement with the alleged crimes." Id. at 1194 (emphasis in the original).

Counsel argued the jury should believe family members who had not testified did not believe the victim. The characterization of this argument as "slight of hand" was appropriate.

E. THERE IS NO LIKELIHOOD THAT ANY MISCONDUCT BY THE STATE INFLUENCED THE OUTCOME OF THIS CASE.

Defendant invites this Court to adopt a new standard of review for allegations of prosecutor misconduct in a case where the credibility of the victim versus the credibility of the defendant is the only issue: "Any prosecutorial misconduct . . . created a 'substantial likelihood' of affecting the jury." Petition 17. This Court should decline petitioner's invitation.

As the Court of Appeals found, the only possible improper argument was if there was reference to matters outside the record. In the context of the entire argument, the inference that all the victim's statements were consistent, which was supported by the evidence, was not likely to affect the verdict. Slip op. at 8.

The cases relied on by petitioner do not support his proposed standard. In State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), this Court re-stated the standard: "We review allegedly improper comments in the context of the entire argument." Id. at 747. This Court found that arguing evidence of other assaults – which were not properly admitted -- as propensity to commit the charged sexual assaults was misconduct warranting reversal. The argument here was not similar to the argument in Fisher.

In Boehning, the Court of Appeals set out the proper standard: "We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Boehning, 127 Wn. App. at 519. There, the argument was that the State had other evidence that proved guilt, not only of the crimes before the jury, but of other, more serious, crimes that had been dismissed. Id. at 523. Again, the argument here pales in comparison to that argument.

Petitioner failed to demonstrate that the comments, to the extent they were error, taken in the context of the entire argument, were likely to affect the outcome of the trial. Under the correct standard, petitioner has not demonstrated prejudice.

IV. CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted on March 15, 2010.

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